

No 40. of as furniture, that the defender had no right to use them any other way than as they had been formerly used.

Reporter, *Shewalton.*

Act. *And. Pringle et Sir John Stewart.*

Alt. *Ro. Bruce.*

Clerk, *Gibson.*

Fol. Dic. v. 3. p. 386. Fac. Col. No 162. p. 242.

1801. December 1. ROLLO *against* IRVING and Others.

No 14.
An extraordinary dividend or *bonus* given by a bank belongs to the liferenter of the stock.

In June 1794, Alexander Houston executed a deed, by which he vested his heritable and moveable estate in the hands of trustees. His conveyance included, among other subjects, 144 shares of the stock of the Bank of Scotland. It provided a liferent to Mrs Houstoun, in these terms: "That my whole heritable and moveable means and estate, generally and particularly herein disposed in trust, shall be, and are hereby burdened with the liferent-right to Mrs Margaret Rollo *alias* Houstoun, my spouse, during all the days of her life, in case she shall survive me; immediately on my decease, to get the shares of the Bank of Scotland, presently standing in my name, transferred in her own name in liferent; and to appoint factors from time to time to receive the dividends then due, or becoming due thereon, and the rents, annual-rents, and profits arising from my other means and effects, both heritable and moveable, hereby disposed in trust, without the consent or interference of my trustees," &c. Upon the death of Mr Houstoun in 1798, the bank stock was accordingly transferred to the widow in liferent, and his trustees in fee; and she received from time to time the ordinary dividends.

Previous to Mr Houstoun's death, an addition had been made to the capital of the bank, and he had subscribed for a number of shares of the additional stock, which were to be paid by instalments; he directed his trustees to pay these instalments, by selling stock in the 3 *per cents.*, of which he had a considerable sum. But it was judged more expedient, both by the trustees and the liferentrix, to allow the calls for the bank-stock to run in arrear, as the Bank were in use of accommodating proprietors in this way, upon their paying interest, to be deducted from their dividends.

At a general meeting of the proprietors of the Bank, on the 26th March 1799, it was ordered, "That an extraordinary dividend or *bonus* be given to the proprietors holding stock, upon the 1st June next, by transferring to them part of the Bank's interest in the 5 *per cents.* 1797, at the rate of L. 5 of the 5 *per cents.* for each share of the Bank of Scotland's stock; or, in the option of the proprietor, that the Bank shall, in lieu thereof, pay to him the selling price of the said 5 *per cents.*, as *per* Lloyd's list, the first transfer day after the 1st of June, at the Bank's office in Edinburgh; and that a sum equal to the *bonus* to be ascertained as above, falling to such proprietors as are in arrear

to the Bank, on their stock account, shall be applied towards the extinction of the arrear due by such proprietor, and that at the same time that the *bonus* is given and executed."

No 41.

In consequence of this resolution, a doubt arose whether Mrs Houstoun, the liferentrix, or Mr Houstoun's Trustees, who were the fiars, were entitled to this extraordinary dividend; and for the purpose of determining the point, Mrs Houstoun brought an action against the Trustees, concluding, "That they should be decerned and ordained to make payment to the pursuer of the fore-said extraordinary dividend, which has been retained by the Bank of Scotland, and applied for the use of the said Trustees."

At the request of the parties, the LORD ORDINARY took the cause to report. The pursuer

Pleaded; 1st, The power of fixing the amount of the dividends of bank-stock, is, by act of Parliament, exclusively vested in a general meeting of the proprietors. The amount of these dividends is different each year, according to the situation of the Bank, but the proprietor must take his dividend, such as it is fixed by the meeting, whatever be its amount. As the liferentrix therefore is obliged to put up with a small dividend, she is entitled to draw a large one when it occurs, during the period of her liferent. 2dly, As Mrs Houstoun, by the terms of her liferent, is entitled to receive 'the dividends and profits,' she has a right to every emolument arising from the fund. This *bonus* is not a dividend of stock, but an extraordinary dividend of profit; and if she be in any year entitled to draw any thing, however inconsiderable, more than the profits of that year, she cannot, by any principle of law, be prevented from drawing these profits, to whatever sum they may amount. 3dly, It is not competent, nor is it perhaps possible, to ascertain how far these accumulated profits have arisen since Mr Houstoun's death. The only period which can be ascertained, is when they became due; and as the pursuer's executors, after her decease, could not have any claim upon the trustees for such part of an extraordinary dividend as might be alleged to have arisen from profits during her liferent, neither can the trustees have any claim upon her for such as may be alleged to have arisen from profits before its commencement.

Answered; '*Fructus ordinarios solum percipit usufructuarius.*' Mrs Houstoun can have no title to the *bonus*; 1st, From the nature of her right. A liferenter is only entitled to the ordinary fruits of the subject; the liferenter of a superiority draws the annual duties payable by the vassal, but unless the liferent be constituted by reservation, has no right to the composition at the entry of singular successors; and the same doctrine holds in other subjects; Ersk. b. 2. t. 9. § 58. 2dly, From the nature of the *bonus*. The Bank, besides paying the yearly dividends, is in the use of retaining part of its profits, which is accumulated into a fund, and forms a sort of additional capital. Over this additional capital, the proprietors have no power, except in so far as is granted to them by the occasional division of part of it among them as a *bonus*. It cannot be

No 41.

maintained, that if the Bank were to come to the resolution of dividing their whole stock by way of a *bonus*, that the liferenter would be entitled to it; nor, upon the same principle, can she be entitled to any part of it, except in so far as it may produce increased annual dividends. The Bank have no power, by any resolution of theirs, to alter the rights of third parties, or to give to liferenters, under the name of a *bonus*, part of that stock which belongs to the *fiar*.
 3dly, From the terms of the minute of the Bank, it was ordered to be paid to the 'proprietors holding stock;' and it was provided, that a sum equal to the *bonus* falling to such proprietors as are in arrear on their stock, shall be applied towards the extinction of such arrear. The Trustees of Mr Houstoun are in this situation, and therefore the *bonus* remains in the hands of the Bank, as so much additional capital. The defenders farther referred to the usual practice of the Royal Bank of Scotland, in the application of their extraordinary dividends; and to the English case, *Brander versus Brander*, 22d July 1799; Vesey's Reports, v. 4. p. 800.

THE LORDS (29th June 1801,) sustained the defences, to the extent of such part of the extraordinary dividend in question as may have arisen from the undivided profits of the stock during Mr Houstoun's life, and remit to the Lord Ordinary to proceed accordingly.

Each party reclaimed against this interlocutor, both upon the merits of the case, and upon the impossibility of extricating matters according to the principle upon which it proceeded. And the LORDS having advised the mutual petitions, with answers, with one dissenting voice, 'recalled their former interlocutor, and found Mrs Houstoun entitled to the dividend.'

Observed from the Bench: The terms of the liferent are most ample, and the liferentrix is entitled to draw, under the term 'profits,' whatever arises from the bank-stock; nor has the *fiar* any other interest than to prevent the stock from being diminished.

Lord Ordinary, *Craig*.

Act. *Williamson*.

Agent, *Jo. Irving, W. S.*

Alt. *Ross*.

Agent, *Jo. Dundas, W. S.*

Clerk, *Colquhoun*.

7.

Fac. Col. No 9. p. 18.

If the creditors of the *fiar* can pursue the liferenter to find *cautio usufructuaria*,
 see PERSONAL and TRANSMISSIBLE.

If liable to public burdens, see PUBLIC BURDEN.

See FIAR.

See APPENDIX.